down or is likely to have one if she continues to live with him. Such an allegation, if true, can be easily proved by calling medical evidence or evidence of other witnesses. There is no such supporting evidence and having seen and heard the petitioner I find it difficult to believe her story.

The evidence shows that the real reason why the petitioner left the matrimonial home on December 2, 1974 was because the respondent had indicated that he wanted her and their son to go with him to Malaysia for a holiday. The petitioner did not wish to accompany him on such a holiday and being afraid that he may go with their son on a holiday to Malaysia, she left the matrimonial home with her son while the respondent was away. When the respondent returned to the matrimonial home in the evening he was handed by the petitioner's brother a solicitor's letter requesting him to leave the matrimonial home. The respondent was thus thrown out of the matrimonial home. This is not denied by the petitioner.

In a case of this nature the conduct complained of must be looked at as a whole and it must be looked at in the light of the sort of people the parties are. There is no evidence of actual violence of such a character as to endanger personal health or safety. The incidents relied upon by the petitioner are nothing more than little domestic squabbles between two strong headed persons. The petitioner appeared to me to be a strong minded person, very intelligent, not very submissive and one who would not knuckle under the respondent in any argument. She admitted that she was argumentative but "not at every turn." And although the respondent did not give evidence in this case, it is clear from the evidence, that he must be equally strong-headed.

The burden of proof is on the petitioner and she has to prove cruelty beyond a reasonable doubt. In my judgment the petitioner has failed to prove that there is danger to her life, limb or health, bodily or mental, or a reasonable apprehension of it. Accordingly, her petition for divorce is dismissed. By consent, custody of the child of the marriage, Ganesh Raj, is granted to the petitioner with liberty for the respondent to apply for custody later if he so wishes.

Petition dismissed.

Solicitors: *Vaithinathan & Co.; J.B. Jeyaretnam & Co.*

MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. OH KENG SENG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) February 21, 1976]

[Kuala Lumpur — Federal Court Criminal Appeal No. 18 of 1975]

Criminal Law and Procedure — Appeal from High Court exercising criminal revision — Order of High Court that former President of Sessions Court who had been appointed Deputy Public Prosecutor incompetent to continue hearing criminal case — Whether criminal matter and therefore Federal Court has no jurisdiction to hear appeal — Courts of Judicature Act, ss. 50 and 64.

This was an appeal from the decision of Ajaib Singh J. (reported at [1976] 1 M.L.J. 143). The learned judge had held that a President of a Sessions Court who had been transferred and appointed a Deputy Public Prosecutor was not competent to continue a part-heard criminal case. He held that the case should be heard by the new President of the Sessions Court.

Held: the order of the High Court was made in a criminal matter and therefore the Federal Court has no jurisdiction to hear the appeal.

Cases referred to:-

(1) *P.P.* v. *Kulasingam* [1974] 2 M.L.J. 26.

(2) *Mohamed Idris bin Haji Mohamed Said* v. *Rex* [1949] M.L.J. 31.

(3) *Teay Wah Cheong* v. *P.P.* [1964] M.L.J. 21.

(4) *Gurbachan Singh* v. *P.P.* [1968] 1 M.L.J. 115.

(5) *Clifford and O'Sullivan* [1921] 2 A.C. 570.

(6) *Amand* v. *Home Secretary & Anor.* [1943] A.C. 147, 161.

FEDERAL COURT.

Haji Abdullah Ngah (Senior Federal Counsel) for the appellant.

Yeap Ghim Guan for the respondent.

Wan Suleiman F.J. (delivering the judgment of the Court): This appeal arose out of an application heard by the learned judge at Seremban, which was made on behalf of one Oh Keng Seng who was charged under section 4(2)(b) of the Sedition Act in the Sessions Court at Seremban.

The trial of that case commenced before Encik Abdul Khalid bin Abdul Manaff.

It would appear that the trial in the Sessions Court commenced on March 1, 1974 and had already taken 6 days, spread out over a period of a year and two months — four days in June 1974 and on May 5 and 6, 1975. A total of 12 prosecution witnesses had given their testimony and the 13th and last witness for the prosecution had completed his evidence-in-chief and was awaiting cross-examination by the defence.

When the case came up for hearing again on May 5, 1975 Encik Abdul Khalid had already been posted to Kedah as a Deputy Public Prosecutor, though as appears to be the usual practice his appointment as a President of the Sessions Court had not been revoked. Before any further evidence could be recorded Mr. Yeap Ghim Guan, counsel for the defendant/applicant objected to Encik Abdul Khalid continuing to hear the case, but his objection was overruled by the latter.

The present application was then made and though it was not founded on any specific provisions

of the law his Lordship called for the record of proceedings for the purpose, as he stated in his judgment, of satisfying himself as to the correctness of Encik Abdul Khalid's order overruling the objection raised by Mr. Yeap.

The applicant also sought a further order that the case be heard *de novo* before another President. Both the applicant and the learned deputy filed affidavits which his Lordship took into consideration.

The applicant in his affidavit expressed his fears of not getting a fair trial if the case continued to be heard by Encik Abdul Khalid. He had also alleged that the transfer of Encik Abdul Khalid to the post of Deputy Public Prosecutor was in effect an abrogation of his previous post as President of the Sessions Court. He further stated that there was a real likelihood of Encik Abdul Khalid being biased and that it would be contrary to public policy and natural justice if the latter continued to sit as President of the Sessions Court as it would impose upon him the dual role of prosecutor as well as presiding officer of the court at one and the same time. This, he deposed, would be embarrassing to Encik Abdul Khalid and would be prejudicial to a fair trial. As Deputy Public Prosecutor Encik Abdul Khalid has the Attorney-General as his head of department and the latter had personally sanctioned the prosecution of the applicant. Besides Encik Abdul Khalid would have access to the investigation papers which are in the possession of the Attorney-General's Chambers.

The Deputy Public Prosecutor however in his affidavit in reply did not agree that Encik Abdul Khalid had ceased to be the President of the Sessions Court (his post not naving been degazetted) and that he was barred from hearing the case. He added that the relevant investigation papers were in his own possession in Seremban so that there could be no question of Encik Abdul Khalid having any access to these and that therefore the application was vexatious and made in order to embarrass a fair trial already in progress and calculated to delay the entire proceedings.

His Lordship then considered the authorities cited on this point. He considered the decision of Hashim Yeop A. Sani J. in *Public Prosecutor* v. *Kulasingam*,[1] a case where the President of the Sessions Court was transferred from his post after having heard the entire prosecution case involving 27 witnesses and numerous exhibits, and appointed a Deputy Public Prosecutor in the same State. Hashim Yeop A. Sani J. said therein:

"My view has always been that it would be perfectly proper for a President or Magistrate who has since been transferred to the Legal Department to assume functions as Federal Counsel or Deputy Public Prosecutor to complete any part-heard cases originally heard by him in the court where he was previously stationed. But of course this must be subject to an overriding condition that there must not be any possible miscarriage of justice or any contravention of rules of natural justice as for example in a case where the officer concerned was previously a President or Magistrate in the same State but has now been appointed to be a Deputy Public Prosecutor in the same State. The mere fact that by virtue of his office he has access to investigation papers relating to the case should disqualify him from hearing the case."

He therefore held that it was not in the interest of justice that the former President, now a Deputy Public Prosecutor in the same State, should continue to hear the case notwithstanding that he had already made an order to call for the defence, on the principle that justice must not only be done but also must be seen to be done. He made an order under section 261 of the Criminal Procedure Code, and setting aside the order calling for the defence and expunging the evidence of the first witness from the record, ordered that another President should proceed with the case under section 261 of the Criminal Procedure Code.

Ajaib Singh J. disagreed with the decision of Hashim Sani J. and was of the view that Encik Abdul Khalid ceased to exercise any jurisdiction in the trial of the applicant upon his appointment as a Deputy Public Prosecutor, no matter where he was transferred on being so appointed. The fact that Encik Abdul Khalid's appointment as a President of the Sessions Court had not been degazetted, he felt, cannot be the sole criterion in deciding whether or not he had ceased to exercise jurisdiction in this part-heard case. He also took into account what he thought were other important factors viz. Encik Abdul Khalid was now performing entirely different functions as a Deputy Public Prosecutor, and that he had vacated his previous post as President of the Sessions Court in Seremban to another officer who had now assumed jurisdiction over all matters pending in that court. In the event, his Lordship held that Encik Abdul Khalid had ceased to exercise the powers of a President of the Sessions Court and was not competent to continue with the hearing of the part-heard case.

In short what Ajaib Singh J. decided is that a Sessions Court President who has become a Deputy Public Prosecutor, no matter where he may be posted as such, is not competent to continue hearing a case he had heard in part before being appointed Deputy Public Prosecutor despite the fact that his appointment as a President of the Sessions Court previously gazetted in the Government Gazette had never been degazetted.

His Lordship then proceeded to deal with the provisions of section 261 of the Criminal Procedure Code. It was his view that the President who succeeded Encik Abdul Khalid had not considered his powers under section 261, remarking that he had presumably thought that it was in order for the previous President *i.e.* Encik Abdul Khalid to complete the trial. He added that in his view it is the duty of the succeeding Magistrate or President to take cognizance of all part-heard criminal cases left behind by his predecessor who has ceased to exercise jurisdiction in those cases and to act under the provisions of this section either by hearing the case *de novo* or by continuing from the point where these have been left by his predecessor. He also counselled that the provisions of this section should be exercised with caution and cited the cases of *Mohamed Idris bin Haji Mohamed Said* v. *Rex*[2] and *Teay Wah Cheong* v. *Public Prosecutor*[3] as guidelines for the proper exercise by Magistrates of their discretion when acting under section 261.

He went on to note that the applicant here is charged with uttering seditious words and that by the very nature of the charge the credibility of witnesses is bound to be of paramount importance; that he did not think this was a proper case where the present President of the Sessions Court may continue from

where it was left by his predecessor and act on the evidence already recorded. Furthermore he reasoned that since all the 13 prosecution witnesses were readily available to give evidence he did not think in all the circumstances that a new trial will result in much loss of time and expense.

It is obvious that his Lordship had in mind the maxim that justice must not only be done but must also be manifestly seen to be done and this impelled him to exercise his revisionary power by ordering that the applicant be tried *de novo* by the present President of the Sessions Court.

Before us Mr. Yeap for the applicant raised a preliminary objection. He argued that the appeal was not properly before the court, which had therefore no jurisdiction. This, he said, is a criminal appeal, and jurisdiction to hear criminal appeals is conferred upon this court by section 50 of the Courts of Judicature Act 1964 which provides that only persons convicted by the High Court may appeal, and that in this instance there has been no conviction.

Under section 64 of the Act, he submitted, there may be a reference on a point of law, on a certificate from the Public Prosecutor, where the person tried has been acquitted by a High Court; section 65 empowers a judge to reserve for the decision of this court any question of law which had arisen during the trial, after conviction of the person tried; and under section 66 a judge may do likewise when an *appeal* from the decision of a lower court in a criminal matter has been determined by a High Court, on the application of a party, and shall do so on the application of the Public Prosecutor. He referred *inter alia* to the decision in *Gurbachan Singh* v. *Public Prosecutor*[4] where this court set out the extent of the right of appeal to the Federal Court in criminal matters. There it was held that under the Act, the right of appeal to this court is limited to those cases coming under sections 64, 65 and 66.

On behalf of the Public Prosecutor, Encik Abdullah Ngah conceded that if this had been a criminal appeal then the appellant would indeed have no right of appeal. This appeal, he contended was not such appeal but a civil one. The High Court order was, he argued not an order of revision but a prohibitory order, and the application before the High Court which resulted in this order being made was in effect an application for a writ of prohibition against Encik Abdul Khalid proceeding with the hearing in the Sessions Court.

So the issue here is, was Ajaib Singh J.'s order an order in a civil matter, as contended by Encik Abdullah Ngah. If it was, then we have jurisdiction. If not, as contended by Mr. Yeap, then we have no jurisdiction.

Encik Abdullah's argument may be summarised as follows. The accused's application was made not under any provision of the Criminal Procedure Code but under section 25(2) of the Courts of Judicature Act which provides —

"... the High Court shall have the additional powers set out in the Schedule...."

Item 1 of the Schedule reads (omitting irrelevant words) —

"Power to issue to any person or authority directions, orders or writs, including writs of the nature of prohibition for any purpose."

Encik Abdullah argued that the fact that this application was entitled by the High Court as "*criminal* miscellaneous application No. 1 of 1975" and the fact that the learned judge purported to make the order he did make in exercise of his power of *criminal* revision, did not alter the substance of this matter, namely that it is a civil (not a criminal) matter, that on the contrary the Public Prosecutor had all along treated this application for prohibition as a civil matter, that when he filed his notice of appeal he advisedly did not entitle it "criminal appeal", that at first he sought to vary the order made by the learned judge as if it was an order in a civil matter, that he subsequently brought this matter up again in the Federal Court in the form of a criminal appeal only on the advice of this court.

With respect we agree that whether or not this is a civil matter depends on its substance, not on what it has been called by anybody.

But with all due respect we hold that this is a criminal matter.

In *Clifford and O'Sullivan*[5] the appellants who were civilians were tried, convicted and sentenced by a military court in Ireland. They applied in the Chancery Division for a writ of prohibition against the military court to prohibit them from proceeding further with the trial of the appellants or from carrying into execution any judgment against them. The Chancery Division refused the application. The appellants appealed to the Court of Appeal in Ireland which had no power to hear an appeal from an order made in a criminal cause or matter, being precluded from so doing by the Supreme Court of Judicature Act (Ireland) 1877. That court held that the order there was made in a criminal cause or matter. The House of Lords, however, held that this was not so.

Lord Sumner said at page 586:

"I think the real test is the character of the proceedings themselves which are the subject matter of the particular application, whatever it be, that constitutes the cause or matter referred to.. .. If [an inquiry] be of a criminal character, an attempt to obtain its prohibition, whether it fails or succeeds and on whatever ground, must be of a criminal character likewise."

It is true that Lord Sumner was in a minority in the above case, but on the principle dealt with in the above excerpt the majority was with him, as is clear from what was said by Lord Porter in a later House of Lords case, *Amand* v. *Home Secretary & Another*:[6]

"... if the proceeding before [a] magistrate was a criminal proceeding the decision of the High Court on a writ of prohibition is a decision in a criminal matter...."

On the authority of the above two decisions, it is in our judgment quite clear that the order against which the Public Prosecutor wishes to appeal was an order made in a criminal, not a civil matter. Accordingly we regret that we have no alternative but to hold that we have no jurisdiction to hear this appeal which certainly at first sight does not appear to be wholly without merit.

Accordingly this appeal is dismissed.

Appeal dismissed.

Solicitors: *Yeap & Co.*